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PRIVILEGED AND CONFIDENTIAL COMMUNICATION

September 10, 2020

Shaun Mulholland, City Manager
City of Lebanon
51 North Park Street
Lebanon, NH 03766

Re: "Welcoming Lebanon" Ordinance
City of Lebanon
Our File No. 20158-47.015

Dear Manager Mulholland:

QUESTION: Could a City agent who broadcast and publicized the location of a federal immigration highway checkpoint in the City, pursuant to Provision #6 of the "Welcoming Lebanon" ordinance potentially end up being criminally liable?

SHORT ANSWER: There is no body of law right on point, so the area is necessarily somewhat "gray." For the reasons given in the "Summary" at the end of this opinion, it is my view that such a prosecution would be unlikely to be successful. But I have not discovered, and am unaware of, any local ordinance from any other city in the US which has a provision similar to Provision #6. Thus there is no helpful precedent. I also have no reason to know the likelihood of such a prosecution being initiated in the first place. And it is worth emphasizing that the risk involved is not a risk to be borne by the City, but instead would be borne by individual agents of the City, who – in the case of a criminal prosecution – could not be represented by the City.

LEGAL DISCUSSION:

1. ***Caveat:*** I have not at this time reexamined my opinions from July 7 and July 17 concerning whether Provision #6 would be preempted by federal law. For purposes of this opinion, I am ***presuming***, solely for the sake of argument, that Provision #6 would be preempted.

2. That presumption by itself, however, does not imply that City officials acting under Provision #6 to publicize the presence of an immigration highway checkpoint would be subject to criminal liability. On the contrary, the doctrine of preemption in no way implies criminal liability. Criminal liability only arises under specific criminal statutes. And in general, public

officials have no greater criminal liability than would private citizens performing the same actions [except in a narrow group of cases where a criminal statute explicitly criminalizes the acts of public officials - for example corrupt practices under RSA Ch. 640].

3. In other words, in my view it would violate criminal laws for a City official to publicize the location of a highway checkpoint only if it would also violate those same laws for a ***private*** citizen to similarly publicize it.

4. I have found zero cases concerning the act of publicizing the presence and location of an immigration checkpoint (other than those cases covered in my July 17 opinion where the question of publicity was discussed in the context of determining whether the checkpoints were constitutional).

5. One somewhat analogous area, where there ***does*** appear to be ***some*** case law, involves the publicizing of locations where police are using radar to detect speed. An interesting case is *People v. Case*, 365 N.E.2d 872 (New York highest court 1977). A truck driver had been arrested for "obstructing governmental operation" when he used a CB radio to warn other truckers of a radar checkpoint ("there's a Smokey takin' pictures up the road"). The New York court held – looking closely at the wording of that state's statute – that "obstruction" of law enforcement required either intimidation or some physical action interfering with law enforcement, none of which had occurred. Thus the conviction was reversed. (The case doesn't appear to have been cited outside New York).

6. New Hampshire's statutes are different from those involved in the New York case. Indeed the type of statute I was most concerned about when I mentioned the possibility of criminal liability was a statute such as N.H. RSA 642:3 "Hindering Apprehension or Prosecution." That statute says (among other things) that "A person is guilty of an offense if, ***with a purpose to hinder, prevent or delay the discovery*** [or] ***apprehension... of another*** for the commission of a crime, he [she/they]... (c) ***Warns such person*** of impending discovery or apprehension[.]" The question is, to the extent that publicizing an immigration checkpoint might tend to warn a highway user whose presence in the US violates immigration laws, would the person doing the publicizing potentially be guilty of "hindering apprehension?"

7. The mental state required to be convicted of "hindering apprehension" was discussed in the NH Supreme Court case of *State v. Brown*, 155 N.H. 164 (2007). Brown was occupying an apartment, when police knocked on the door, told him they were investigating a crime, and asked about another individual named Soto. Brown prevented them from entering, and tried to conceal the fact that Soto was in the apartment. Brown was charged under subparagraph (a) of RSA 642:3 (harboring or concealing another). He argued he couldn't be convicted in the absence of proof that he ***knew*** that Soto had committed an offense. But the Court said the statute doesn't require such knowledge: "The defendant need only act with the intent to harbor or conceal a person from apprehension and discovery."

8. Still, there's quite a bit of difference between, on the one hand, harboring (or in the case of subparagraph (c) warning) a ***specific*** individual when you know that individual is wanted by the police, and on the other hand, merely broadcasting to the world at large as to the location of a law enforcement checkpoint, and the general type of laws (immigration laws) involved. I would argue that the way RSA 642:3, I(c) is written, the offender's purpose has to be the hindering of the apprehension of ***some specific individual*** ("of another" in the words of the statute), and moreover, that the statute requires a warning be delivered ***to that individual*** ("warns such person").

9. There are no New Hampshire cases addressing issue in the context of publicizing a police checkpoint such as a radar unit. I also looked at the annotations under Section 242.3 of the Model Penal Code (which according to the *State v. Brown* case was the model for RSA 642:3). None of the cases citing statutes similar to N.H.'s and based on that section of the Model Code involved the issue of publicizing any type of highway checkpoints.

10. On the other hand, there are cases from around the US where drivers have been cited under other types of statutes for flashing their headlights in order to warn other drivers of a radar speeding checkpoint. Most of those cases involve the wording details of specific state laws or local ordinances. But here are a few cases I discovered which go a bit beyond that. (Of course none of these cases is binding precedent, but they might still be persuasive.)

(a) *Obriecht v. Splinter*, 2019 WL 1779226 (US W.D.Wisc). This was a challenge to the constitutionality of Wisconsin's practice of stopping and citing drivers who flash their headlights to warn of speed traps. Obriecht had passed a speed trap, and afterward flashed his lights at other drivers to warn them. He was cited for violating a state law prohibiting passenger vehicles from displaying flashing lights. The Court allowed the challenge to proceed on the ground that the flashing of the headlights was arguably speech protected by the First Amendment.

(b) *Elli v. City of Ellisville, MO*, 997 F.Supp.2d 980 (US E.D.Missouri 2014). This is a case which was cited in the *Obriecht* case. It arose in a similar way, except Mr. Elli was charged with violating a city ordinance against flashing headlights. ***The Court emphasize that none of the drivers Mr. Elli flashed at was specifically suspected of having violated the law,*** and said that "the flashing of headlamps is commonly understood as conveying the message to slow down and proceed with caution." The Court thus rejected the notion that Elli's aim was to hinder apprehension or prosecution. The Court issued a preliminary injunction based on interference with First Amendment rights.

(c) *City of Warrensville Hts. v. Wason*, 50 Ohio App.2d 21 (OH intermediate court 1976). Wason had flashed headlights in warning of a radar trap, and had been convicted

of "interfering or hindering" officers under a local ordinance similar to N.H. RSA 642:3. The Court overturned the conviction, saying that (a) first, there was no evidence that any of the persons "warned" by the flashing of the lights was actually engaged in speeding or other illegal activity; and (b) there was no evidence that police were attempting to apprehend any such person, and hence Mr. Wason was not hindering any such apprehension.

(d) *Cover v. State*, 466 A.2d 1276 (MD intermediate court 1983). Ms. Cover had been convicted of hindering police in performance of their duties. She had driven down a street sounding her horn to alert a specific person that police had him under observation (namely, anticipating that he might break into a restaurant storehouse). The court said cases where warnings were intended to prevent a crime are not the same as a warning to prevent apprehension. The conviction was overturned.

(e) *Martinez v. City of Rio Rancho,* 197 F.Supp.3d 1294 (US D. New Mexico 2016). Ms. Martinez had flashed headlights and sounded her horn to signal that another driver had his high beams on. She was charged with violating a City ordinance prohibiting the flashing of lights or sounding of horns. She claimed she had a First Amendment right to these expressions. The Court held that she did have a Free Speech interest. But it held that the ordinance was content-neutral and viewpoint neutral, hence was subject only to intermediate scrutiny. The ordinance was held to serve a substantial governmental interest, and was held to be "narrowly drawn." It was thus upheld.

(f) *Sarber v. Commissioner of Safety*, 819 N.W.2d 465 (MN Ct of Appeals 2012). Sarber's license had been revoked on account of flashing his lights after passing a radar checkpoint. The question here was whether that act gave a police officer justifiable grounds for stopping him. Held: Where there was no evidence that other drivers were blinded, impaired or distracted, there was no violation of the specific Minnesota statute as worded, hence no grounds for the stop. The license revocation was reversed.

11. The above cases, being all over the map, make it clear that there is no uniform rule or trend on this issue – including the question of whether the flashing of headlights constitutes protected speech. It does seem significant, however, that I have not found any case in this realm wherein anyone was found guilty of "hindering apprehension" or any other type of obstruction of law enforcement. The violations, if any, were only of state or local laws prohibiting the flashing of lights. [There is no similar NH law against headlight flashing.]

12. On the other hand, the relevance of the radar-speed-trap type of case to our inquiry is somewhat limited. An immigration checkpoint is conceptually different from either a speed checkpoint or a sobriety checkpoint, because the purpose of both of those types of checkpoints is to ***deter*** violations of the law, whereas an immigration checkpoint has no deterrent purpose, only a purpose to ***apprehend*** violators.

12. So far I have been focusing on the possibility of state law criminal liability under RSA 642:3. But realistically, the more likely scenario is one where a ***federal*** prosecutor might attempt to charge the City's agent for some type of law enforcement interference under ***federal*** criminal statutes.

13. The general federal statutes covering obstruction of justice are found at 18 U.S.Code Chapter 73. For example:

(a) 18 USC § 1501 penalizes someone who "knowingly and willfully obstructs, resists, or opposes any officer of the US…in serving or attempting to serve or execute any legal or judicial writ or process of any court…or magistrate judge." I don't believe that applies here, unless the City agent were to know that a federal officer were attempting to serve process, and took action to prevent it.

(b) § 1505, among other things, penalizes someone who "corruptly, or by threats of force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency. Again, this section wouldn't apply unless the City agent were engaged in corruption or threats.

14. 18 USC Chapter 73 notably does ***not*** contain a statute which is the equivalent of RSA 642:3, I(c) – "hindering apprehension" by giving warnings. [In fact the only federal regulation I found which uses such "warning" language is at 25 CFR § 11.435 – which is part of a group of provisions which applies only on Indian reservations.]

15. The most relevant ***general*** federal statute on "hindering apprehension" is the "Accessory after the fact" statute found at 18 USC § 3, which reads in relevant part as follows: "*Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.*" It is noteworthy that – ***unlike*** the NH statute (as explained in the *State v. Brown* case (above)), this federal law does not apply unless the offender ***knows*** that an offense has been committed, and nevertheless assists the offender.

16. The key question is: what is the required specificity for the phrase "knowing that an offense against the US has been committed"? In other words, does proof of a violation of this statute require proof that there exist ***specific*** individuals who are known to have committed offenses, and then were given assistance? Or, conversely, would someone be guilty under this statute simply by opening a website called "Tips on Eluding Law Enforcement"? After all, we ***all*** know that there's ***somebody*** out there who has violated immigration laws.

17. I have carefully read the case note annotations under 18 USC § 3, and it is my strong impression that specificity is required. The title of the statute is "Accessory after the fact," and the language of the cases generally assumes and implies that in order for one party to be guilty as an "accessory" there must be some other party identified as the "principal" offender. Proof of that underlying offense is a necessary element of the proof of being an accessory (*see, e.g., Neal v. United States*, 102 F.2d 643 (8th Cir. 1939)).

18. It is always difficult to prove a negative. But despite diligent searches, I have found ***not one single*** case of anyone being found criminally liable for publicizing or warning of the location of a police checkpoint, either under federal or state law. The only analogous cases I've found which examined the issue of whether such "warnings" constituted obstruction of law enforcement were those cited under Paragraph 10 above, where such claims were rejected.

SUMMARY CONCLUSION. There is no case law explicitly negating the possibility of criminal liability for publicizing the location of highway immigration checkpoints. For the following reasons I believe it is more likely than not that such a prosecution would ***not*** result in conviction:

(a) The complete lack of any case record of such a conviction anywhere in the US.
(b) The very strong implication in both federal and state law that in order to be guilty of hindering the apprehension of a suspect, there must be proof of a ***specific individual*** that law enforcement was attempting to apprehend – an element probably present under Provision #6.
(c) The fact that the agent (for state law purposes) would not be acting "with a purpose to hinder…apprehension…" Instead the agent's purpose would be to fulfill the mandate of the ordinance.
(d) The availability of a free speech argument, as discussed in the *Elli* case, above. (And note that, contrary to the *Martinez* case (above), the laws involved are not content-neutral).

Nevertheless, as I emphasized at the beginning of this memo, the risk is far from being zero, and the risk of criminal liability is one which, under Provision #6, would be borne by individual City personnel, not by the City itself.

Recommendation: In order to further protect against the possibility of criminal liability (and ***if*** the Task Force – contrary to my recommendation – does end up endorsing some form of Provision #6), I would recommend inserting language stating that the obligation of city agents to publicize the checkpoint does not apply where the agent knows or has reason to believe that the purpose of the checkpoint is to apprehend some specific individual(s) known or suspected to be offenders.

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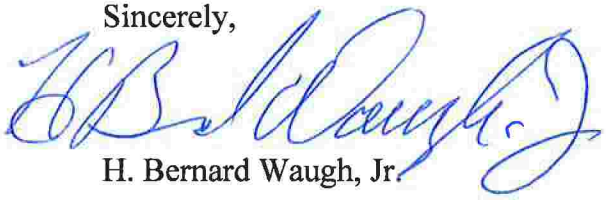
Sincerely,



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